No. 82-1271

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

HERMAN DELGADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether INS agents violate the Fourth Amendment when, possessing probable cause to believe that a number of employees at a factory are illegal aliens, they conduct a survey of the factory's employees by stationing agents at the factory exits and walking through the factory addressing brief inquiries to individual employees suspected of being aliens regarding their citizenship or resident alien status.

PARTIES TO THE PROCEEDING

Joseph Sureck (now replaced as District Director of INS by Michael Landon), William French Smith, Leonel J. Castillo (now replaced as Commissioner of INS by Alan C. Nelson), Gil Clarin and James Robinson were appellees below in their official capacities and are also petitioners here. Herman Delgado, Ramona Correa, Francis Labonte, and Maria Miramontes were appellants below and are respondents here. The International Ladies' Garment Workers' Union, AFL-CIO (ILGWU) was originally a plaintiff in the district court, but the court ordered it dismissed as a party (Pet. App. 59a-61a). ILGWU appealed from the dismissal order, and thus, while the court of appeals did not rule on that portion of the appeal (Pet. App. 43a n.24), ILGWU is nominally a respondent here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 681 F.2d 624. The opinions of the district court (Pet. App. 45a-60a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a) was entered on July 15, 1982. A petition for rehearing was denied on September 30, 1982 (Pet. App. 44a). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 28, 1983. The petition was filed on that date and was granted on April 25, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8 U.S.C. 1357(a) provides in pertinent part:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> > (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *

STATEMENT

This case concerns the permissibility under the Fourth Amendment of the Immigration and Naturalization Service's practice of conducting factory surveys for the purpose of locating illegal aliens.

1. As this Court has observed, "[i]t has been national policy for many years to limit immigration into the United States." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 551 (1976). Congress has sought to implement this policy by setting an annual immigration quota.[1] It is well documented, however,

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[1] Before 1978, Congress had established separate annual immigration quotas for aliens from the Eastern and Western Hemispheres. See 8 U.S.C. 1151 (annual ceiling of 170,000

that "[m]any more aliens than can be accommodated under the quota want to live and work in the United States. Consequently, large numbers of aliens seek illegally to enter or to remain in the United States." *Ibid.* A recent Census Bureau study reveals that more than 2 million illegal aliens were counted in the 1980 census. J. Passel & R. Warren, *Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census* 8 (U.S. Bureau of the Census Apr. 1983). Of these, nearly two-thirds were from Latin America, including Mexico. *Id.* at 9. The number of illegal aliens who eluded the latest census is sheer conjecture.[2] But, as this Court has recognized, "[w]hatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-879 (1975).

In the experience of the Immigration and Naturalization Service, high concentrations of illegal aliens are likely to be found in factories that employ large numbers of unskilled or semi-skilled workers. See J.A. 46-47. Accordingly, factory surveys are the most effective means of detecting illegal aliens who have eluded the Border Patrol. In 1977, of approximately 200 illegal aliens apprehended daily in the

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aliens from the Eastern Hemisphere and 120,000 aliens from the Western Hemisphere). In 1978, Congress enacted legislation providing for a single, world-wide quota of 270,000. See 8 U.S.C. (Supp. V) 1151.

[2] In 1979, the Assistant District Director of the INS in Los Angeles estimated that at least a half million illegal aliens resided in the Los Angeles area alone. J.A. 43.

United States in areas away from the border, between 100 and 150 were found during the execution of factory surveys. J.A. 47.[3] In Los Angeles alone during that year, more than 20,000 illegal aliens were arrested in the course of such surveys; on some occasions, a survey of a single factory resulted in the apprehension of more than 100 illegal aliens in a single day. J.A. 43-44, 46.

2. The specific factual context underlying this case consists of three factory surveys conducted by the INS in 1977 at two garment factories located in the Los Angeles area. The record contains affidavits by government officials relating to the manner of conducting these and other factory surveys, together with depositions of the individual respondents and of immigration officers describing the surveys. As the court of appeals found (Pet. App. 8a), the material facts are not seriously in dispute.

a. In January and September 1977, the INS obtained search warrants authorizing its officers to search the business premises of the Southern California Davis Pleating Company (Davis Pleating) for illegal aliens. The warrants did not identify any particular illegal aliens by name. Instead, the warrants, which were based on reliable information showing that Davis Pleating employed illegal aliens, authorized INS agents to search the factory for such persons (Pet. App. 5a & n.5).[4] Pursuant to these war-

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[3] More recently, the INS has estimated that factory surveys accounted in 1982 for approximately 60% of all illegal aliens apprehended by the INS in nonborder locations. This figure was derived by the INS from its own internal records and is consistent with the statement cited in the text.

[4] The affidavit submitted in support of the January warrant stated that INS investigator Gail Richard Kee had con-

rants, INS officers entered Davis Pleating in January 1977 and arrested 78 illegal aliens from among approximately 300 employees present on the premises; in September 1977, the officers arrested 39 illegal aliens out of a work force of approximately 200 employees. Pet. App. 4a; J.A. 51.

In October 1977, INS officers conducted a survey of the work force at Mr. Pleat, another garment factory. This survey also was conducted because the INS had received information establishing that Mr. Pleat employed illegal aliens. On this occasion, however, the INS agents entered the factory with the consent of Mr. Pleat's owner, rather than pursuant to a warrant. This survey resulted in the apprehen-

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ducted surveillance outside the Davis Pleating factory and had stopped three female illegal aliens entering the factory. Each of the three women, who were named in the affidavit, informed Investigator Kee that Davis Pleating employed many illegal aliens of Latin extraction. (This affidavit was attached as Exhibit A to the first amended complaint in No. CV 78-0740-LEW (PX). See J.A. 10.)

The September warrant was issued on information volunteered to the INS by Rachel Mata, an employee at Davis Pleating who was displeased with the company's hiring of illegal aliens. Mata identified by name two illegal aliens who had been deported following the January survey and had returned to the United States and resumed their positions at Davis Pleating. She further stated that many other employees boasted that they had no immigration documents and that if arrested they would return immediately to the United States and resume their jobs. She also reported that Davis Pleating had recently hired about one hundred employees and that most of them appeared to be illegal aliens. Information was also supplied to the INS by an illegal alien who worked at Davis Pleating. She maintained that four of her coworkers were illegal aliens. (The affidavit supporting the September warrant was attached as Exhibit C to the complaint in No. CV 78-3246-WMB (GX).)

sion of 45 illegal aliens out of a work force of approximately 90 employees. Pet. App. 4a; J.A. 51.[5]

The factory surveys at both Davis Pleating and Mr. Pleat were conducted in accordance with standard INS procedures established on a nationwide basis. See generally J.A. 43-45, 46-50, 52-54. A team of plainclothes INS agents wearing INS badges entered the factory to question the employees while other agents stationed themselves at the doors to prevent suspected illegal aliens from escaping.[6] The agents identified themselves and announced their purpose. The agents, who displayed no weapons and

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[5] Ordinarily, when INS officers receive reliable information that a factory is employing illegal aliens, they will contact the owner and seek his consent for a factory survey. In more than 90% of the cases, the owner consents to the survey. If consent is refused, the officers apply for a search warrant authorizing them to enter the factory to conduct a survey. J.A. 44, 47, 52-53.

[6] The court of appeals concluded that agents are positioned at the doors "to prevent persons from leaving the workplace." Pet. App. 4a (footnote omitted). As the record demonstrates (see J.A. 98, 136-137), however, the agents at the exits do not prevent employees from exiting the factory. They are stationed at the exits so that they can observe persons who approach the exits, question as to their citizenship status those persons they believe to be aliens, and detain for further inquiry those persons who they reasonably suspect are aliens illegally in the United States. J.A. 151, 154, 157-158. Although the court of appeals purported to rely for its conclusion on the statement of the INS's Assistant District Director that "[o]fficers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape" (Pet. App. 14a; J.A. 48), this statement clearly is a reference to the need to prevent suspected illegal aliens from taking flight. As the Assistant District Director further explained (J.A. 50), "[i]n instances where a person is found hiding or after attempting to flee from an Immigration officer, such person is detained for questioning based on the premise that he did attempt to hide or abscond."

were instructed to be courteous and cause as little disruption as possible, then walked slowly through the factory, asking between one and three questions of employees who they had reason to believe were aliens.[7] Generally, the first question pertained to place of birth or citizenship status. If the individual replied that he was born in the United States or that he was a citizen, usually no further questions were asked. If the response gave the agent reason to believe that the individual was an alien, the agent would ask the basis for the alien's presence in the United States[8] and would ask to see the alien's im-

[7] The court of appeals stated (Pet. App. 4a) that INS agents are instructed to question each worker, but the record demonstrates that this statement is erroneous. As a matter of policy, the INS instructs its agents to question as to citizenship status only those persons who they reasonably suspect are aliens. See J.A. 41; but see J.A. 154-155. The record, including the depositions of the respondents, confirms that the agents do not question all employees in this regard. J.A. 44, 48-49, 86, 105-106, 113, 155-156. By the same token, INS agents may ask employees who are not suspected of being aliens whether they know of other employees who are illegal aliens or who have concealed themselves from the agents; in some instances, the agents may respond to questions posed by employees. J.A. 49, 53. Thus, in practice, the agents do speak to most of the employees they encounter, and they do not invariably have a reasonable suspicion of alienage with respect to each person whom they engage in conversation during a factory survey. J.A. 55. INS agents are specifically instructed, however, that they may not *detain* individuals for inquiry into their right to enter or remain in the United States except on a reasonable suspicion that they are illegally present in this country. See J.A. 41. As we argue below, the INS's instructions to its agents are more restrictive then the Fourth Amendment or the relevant statutes require. See pages 32-40 & note 25, *infra*.

[8] For example, the employee might be present in the United States as a permanent resident alien or on a temporary basis with a valid work permit.

migration papers.[9] See, *e.g.*, J.A. 44, 47, 83-88, 94-96, 101-106, 115, 120-122, 123-124, 134, 138-139, 152.[10]

Throughout the surveys, the agents used no force (except when necessary to effect the arrests of illegal aliens). The employees were free to walk around within the factory and to continue with their work. Generally, upon the arrival of the INS agents, cries of "la migra" (the immigration) were heard and some employees would attempt to flee or hide. The agents did not give chase after these employees, but rather continued their survey until they reached the hiding place of the illegal aliens. See, *e.g.*, J.A. 81-84, 90, 91, 92-93.

b. The respondents are four employees who were present during the surveys at their work place. None of the respondents was arrested. Respondent Delgado is employed by Davis Pleating and is a citizen born in Mayaguez, Puerto Rico. J.A. 79. During the January survey, he was not questioned by the INS agents regarding his citizenship or immigration status, although he was asked by one agent if he had a key for the back door. J.A. 86, 90. Delgado walked freely throughout the factory during the survey,

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[9] Every alien is required by statute to carry his certificate of alien registration or alien registration receipt card with him at all times. 8 U.S.C. 1304(e).

[10] Those aliens who are unable to produce documentation evidencing their right to remain in the United States are detained while the agents attempt to ascertain whether the aliens are legally present in this country. In a majority of cases, an individual who is here illegally will admit his illegal status to the INS agent. J.A. 49-50. If the agents confirm an alien's illegal status and he appears likely to flee, he is arrested and subsequently is either deported or permitted to depart the United States voluntarily. J.A. 44.

which lasted between one and one and a half hours. J.A. 85, 90. During the September survey, Delgado again was allowed to walk throughout the factory. J.A. 93-94. On this occasion an INS agent asked Delgado where he was born. When Delgado responded that he was born in Mayaguez, Puerto Rico, the agent moved on to another worker. J.A. 94-95. While the survey was being conducted, Delgado left the factory building to load a truck. He was neither stopped nor questioned by the INS agent stationed at that door. J.A. 98.

Respondent Correa also worked at Davis Pleating. She is a United States citizen who was born in Southern California. J.A. 100. During the surveys, she was permitted to walk through the factory without interference from the immigration officers. J.A. 109-113. She was asked no questions during the January survey. J.A. 106. In September, however, an agent asked Correa, as she was walking through the factory, where she was born. After responding that she was born in California, Correa continued on her way without further questioning. J.A. 115.

Respondent Labonte also worked at Davis Pleating. She is a resident alien who was born in Mexico. During the September survey she was seated in front of a machine when an agent tapped her on the shoulder and asked to see her immigration papers. She displayed her papers and was not questioned further. J.A. 138-140. At one point, Labonte exited the factory, approached some INS officers outside the building, and asked them why they were taking the illegal aliens away. J.A. 136-137, 143.

Respondent Miramontes, a resident alien, worked at Mr. Pleat. J.A. 117. When the October survey began, Miramontes was walking to her work station

from an office when an INS agent asked her if she was a citizen. When she responded that she was not, he asked to see her papers. Miramontes showed her papers, and the agent continued on his way. J.A. 120-121. Miramontes had no other contact with the agents. J.A. 129.[11]

3. In 1978, respondents filed two separate actions for declaratory and injunctive relief in the United States District Court for the Central District of California, challenging the constitutionality of INS factory surveys. J.A. 6-17, 18-29. The actions (which were subsequently consolidated) were brought by respondents on behalf of a class consisting of all persons of Latin ancestry employed in the garment industry or any other industry in the Central District of California. J.A. 8, 30. In addition, the International Ladies' Garment Workers' Union (ILGWU) was named as a plaintiff in both complaints. J.A. 6-7, 18-19.

Respondents' principal contention was that the factory surveys violate the Fourth Amendment.[12] They contended that INS agents may not enter a factory for the purpose of conducting a survey without either the consent of the employees or a warrant

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[11] The first amended complaint in No. CV 78-0740-LEW (PX) alleged that a fifth named plaintiff, Guadalupe Rodriguez, was arrested during the survey at Mr. Pleat and transported to Mexico despite his having informed the INS agents that he was a United States citizen. J.A. 13. In fact, however, Rodriguez was an illegal alien who was properly arrested; when petitioners pointed out this fact, Rodriguez was dropped as a party to the action.

[12] Respondents also asserted that the surveys violate the equal protection component of the Fifth Amendment's Due Process Clause, but the courts below did not reach this issue. See Pet. App. 7a-8a n.7.

specifically naming the individuals to be questioned. They also contended that INS agents may not stop and question individual employees without their consent in the course of a factory survey unless the agents have either a warrant naming those individuals, probable cause to arrest those individuals without a warrant, or reasonable suspicion that the individuals are aliens unlawfully in the United States. J.A. 16-17, 27-28.

The district court denied respondents' motion to certify the class and also dismissed the ILGWU as a party for lack of standing. See Pet. App. 6a, 58a-60a. Thereafter, the district court granted petitioners' motion for partial summary judgment, holding that the owner of a workplace may give a valid consent to entry by the INS agents and that a warrant authorizing such an entry need not identify each person to be questioned by the agents. Pet. App. 53a-57a. Subsequently, the court entered supplemental findings of fact and conclusions of law holding, *inter alia*, that the two warrants issued to search for illegal aliens at Davis Pleating were valid and were based upon probable cause. Pet. App. 49a-52a.

On a second motion for summary judgment, the district court considered the Fourth Amendment implications of the manner in which the factory surveys were conducted. The court concluded that none of the respondents had been arrested or detained and that INS agents are entitled to pose questions to anyone so long as they do not detain the person. Alternatively, relying on *United States* v. *Martinez-Fuerte*, *supra*, the court held that, even if respondents technically "had experienced some form of seizure by placement of INS investigators at the

factory exits, the degree of intrusion on [respondents] was so limited that there was no violation of the Fourth Amendment." Pet. App. 47a. The court also concluded (*ibid.*) that, under 8 U.S.C. 1357(a)(1), any person believed to be an alien may be questioned about his right to be in the United States. Accordingly, the court found that respondents' Fourth Amendment rights had not been violated in the course of the factory surveys, and it granted petitioners' motion for summary judgment. *Id.* at 45a-48a.

4. The court of appeals reversed. Pet. App. 1a-43a. The court held that the method of executing the factory surveys, including stationing agents at the exits to prevent illegal aliens from escaping, constituted a seizure of the entire work force and that such a seizure violated the Fourth Amendment in the absence of a "reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys." *Id.* at 40a.[13]

Relying heavily (see Pet. App. 13a-16a), on *Illinois Migrant Council* v. *Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982), the court of appeals first concluded that the execution of the factory surveys, particularly the stationing of agents at the exits, "sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys." *Id.* at 12a. The court acknowledged that the respondents "had varying degrees of freedom to circulate through or exit the factories" (*id.* at 19a),

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[13] The court of appeals upheld the district court's denial of class certification. Pet. App. 43a n.24. It did not reach the question whether the district court correctly dismissed the ILGWU as a party (*ibid.*), and it did not address the validity of the search warrants. *Id.* at 9a.

but it nonetheless ruled that the work force was seized for the entire duration of the survey. The court stated that the surprise appearance of a substantial number of INS agents, the announcement of their authority and display of badges, their method of proceeding systematically down the rows of workers, and their use of handcuffs to detain suspected illegal aliens "represented a threatening presence * * * to the reasonable worker." *Ibid.* Moreover, the court observed that the practice of positioning agents at the exits in order to apprehend those attempting to flee "indicated to the entire workforce that departures were not to be contemplated." *Ibid.* In these circumstances, the court concluded that "even before individual questioning began, a reasonable worker 'would have believed that he was not free to leave' " (*id.* at 20a, quoting *United States* v. *Anderson*, 663 F.2d 934, 939 (9th Cir. 1981)), and, hence, the entire work force was seized within the meaning of the Fourth Amendment for the duration of the survey.[14]

The court of appeals then held that the Fourth Amendment permits the INS to detain an individual for questioning only on the basis of a reasonable suspicion that the person detained is an alien *illegally* in this country. Pet. App. 22a-32a. The court noted that the Fourth Amendment generally requires a suspicion of illegality to support a limited detention and concluded that the same requirement applies

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[14] The court did, however, reject respondents' contention under *Dunaway* v. *New York*, 442 U.S. 200 (1979), that the manner in which the factory surveys were conducted constituted an arrest of the work force requiring probable cause. Pet. App. 11a-12a. The court specifically found that no one was arrested "until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation." *Id.* at 12a.

here. *Id.* at 30a-32a. Although it recognized that 8 U.S.C. 1357(a)(1) expressly authorizes INS agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," without any requirement of a suspicion of illegal presence, the court held that under the Fourth Amendment any questioning pursuant to Section 1357(a)(1) that is accompanied by a seizure of the person may be conducted only when an agent reasonably suspects that the individual being questioned is an alien illegally present in this country. Pet. App. 30a-32a. A different rule, the court concluded, "would grant the INS impermissible discretion to detain and question at whim." *Id.* at 32a.

The court of appeals further held that any detentive questioning of an alien had to be based on an *individualized* suspicion of illegal alienage. Pet. App. 32a-39a. The court acknowledged that this Court in *United States* v. *Martinez-Fuerte*, *supra*, had recognized that a seizure within the meaning of the Fourth Amendment could be effected in some circumstances in the absence of an individualized suspicion of illegality, but it distinguished *Martinez-Fuerte* on the ground that the permanent checkpoint stop involved in that case entailed a lesser intrusion than the factory surveys involved here. Pet. App. 32a-35a. Accordingly, the court concluded that reasonable suspicion or even probable cause to believe that numerous illegal aliens are working in a factory is insufficient to justify the seizure of any individual alien. *Id.* at 35a-39a.

Finally, applying the foregoing principles to the instant case, the court of appeals held that the surveys violated the Fourth Amendment because they resulted in the seizure of the entire work force when

the INS agents did not have an individualized suspicion that each employee was an illegal alien. Pet. App. 39a-42a.

SUMMARY OF ARGUMENT

The court of appeals in this case has held that the manner of executing INS factory surveys, in particular the practice of positioning INS agents at the doors to prevent the escape of illegal aliens, constitutes a "seizure" of the entire work force for the duration of the survey, and that the Fourth Amendment prohibits INS agents from detaining any employee for questioning regarding his citizenship status during a survey unless the agents have a reasonable suspicion of illegal alienage with respect to that particular employee. It is obvious that this holding—which requires the INS to have a reasonable suspicion of illegal alienage with respect to every employee who happens to be on the premises during a factory survey—is one that the INS will never be able to satisfy. The court thus has effectively invalidated an extremely effective procedure for locating and apprehending illegal aliens who have attempted to assimilate themselves into the general population.

A. The court of appeals erred in concluding that the stationing of agents at exits during a factory survey results in a "seizure" of the entire work force. The surveys are conducted during normal working hours, when the employees presumably are required in any event to be present at their work stations. In these circumstances, it is difficult to perceive how the employees' "freedom to leave" is meaningfully curtailed by the positioning of agents at the doors. Moreover, because the purpose of the surveys—to apprehend illegal aliens—is manifest, a citizen or

lawfully present alien should not reasonably feel threatened or restrained because of the manner in which the surveys are executed.

B. Even if the stationing of agents at factory exits is in some technical sense a "seizure" of the entire work force, that seizure is nevertheless "reasonable" under the Fourth Amendment. In *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that the Border Patrol may operate permanent checkpoints on major roads leading away from the border, even though the operation of the checkpoints results in the seizure of each automobile as it reaches the checkpoint and even though some vehicles are referred to a secondary location for questioning for up to five minutes without any basis for suspicion that they contain illegal aliens. The Court reached this result by application of the Fourth Amendment's general "reasonableness" standard, under which a particular law enforcement practice is judged by balancing the intrusion on the individual's Fourth Amendment interests against the governmental interests that are promoted by the practice.

Under this test, the governmental interests that support the practice of stationing agents at factory exits during a survey substantially outweigh the minimal intrusion, if any, that this practice entails on employees' Fourth Amendment interests. By focusing on businesses that employ significant numbers of illegal aliens, factory surveys are by far the most effective means of apprehending illegal aliens who have eluded the Border Patrol. The use of such surveys thus increases the number of jobs available to lawful residents and deters the arrival of still more illegal aliens. Moreover, the manner in which the surveys are conducted, including the stationing of agents at

the doors to prevent the escape of illegal aliens, is entirely reasonable and necessary if the surveys are to be effective in accomplishing their objective. On the other hand, the alleged seizure involved in a factory survey—during which workers are free to go about their business—is purely theoretical, and the subjective intrusion on a lawful resident worker is virtually nonexistent because the worker knows that the survey is directed at apprehending illegal aliens and that at most he will be asked only one or two questions and requested to display his immigration documents.

C. Although we doubt that any employee is seized at all within the meaning of the Fourth Amendment when he is approached by an INS agent during a factory survey and questioned about his citizenship status, to the extent that such encounters do entail a seizure of the employee, the court of appeals clearly erred in holding that INS agents may not engage in such detentive questioning unless they have a reasonable suspicion of *illegal* alienage with regard to each employee questioned.

1. In our view, the Fourth Amendment generally permits INS agents to stop and question a person as to his citizenship status on the basis of a reasonable suspicion of alienage alone. In the exercise of its broad powers over immigration, Congress has provided that every registered alien "shall at all times carry with him and have in his personal possession" his alien registration document. 8 U.S.C. 1304(e). In addition, Congress has empowered immigration officers "to interrogate any * * * person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. 1357(a)(1). Under this statutory scheme, Congress has conditioned each alien's privilege of residing or working

in the United States on fulfillment of the obligation to carry at all times a registration card evidencing his right to be here. Aliens who choose to reside or work here accept that obligation and, by the same token, the obligations to respond to questions concerning their immigration status and to produce proper documentation when requested to do so by INS officials. If they were free to disregard such a request, the requirement to carry identification would be rendered virtually meaningless.

Contrary to the view of the court of appeals, it is not "arbitrary" for INS agents, on the basis of objective, articulable facts giving rise to a reasonable suspicion that a person is an alien, to stop and question the person as to whether he is an alien and whether he is carrying with him the proper alien registration documents required by law. The requirement that there be reasonable and particularized suspicion underlying the selection of particular individuals for detention and questioning constitutes an effective curb on arbitrary official behavior.

2. Even if detentions of employees for questioning during factory surveys must be based on reasonable suspicion of illegal alienage, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Martinez-Fuerte*, 428 U.S. at 561. Obviously, when his suspicion focuses on a single individual, a law enforcement officer wishing to detain the individual must have articulable grounds to suspect that that individual may be engaged in illegal activity. But there is no reason why, in other contexts, the basis for suspicion must be "individualized." Thus, for example, if an officer knows that seven out of ten persons are illegal aliens, the knowledge that three of the persons will turn out to be innocent does not alter the fact that, in the

absence of additional information dispelling suspicion with respect to a particular individual, the officer has a reasonable suspicion (indeed, probable cause) of illegal alienage with respect to each person sufficient to justify an initial detention for purposes of inquiry.

ARGUMENT

TO THE EXTENT THAT FACTORY WORKERS ARE SEIZED AT ALL IN THE COURSE OF INS SURVEYS, SUCH SEIZURES ARE REASONABLE UNDER THE FOURTH AMENDMENT

The court of appeals did not question the right of INS agents to enter business premises, under the authority of either a warrant or the consent of the owner, in order to conduct a factory survey to identify and apprehend suspected illegal aliens. Accordingly, the questions presented in this case relate only to whether the Fourth Amendment is violated by the manner in which INS agents conduct surveys such as those carried out at respondents' places of employment. Moreover, although the Fourth Amendment governs both "searches" and "seizures," there is no contention here that factory employees are searched in the course of INS surveys. Thus, the case turns on the extent, if any, to which employees such as respondents are seized during the surveys and, if they are, whether their seizure is "reasonable" under the Fourth Amendment.

We note at the outset that there are two different species of asserted seizures involved in this case. The first arises from the court of appeals' holding that, by stationing agents at the factory doors, the INS "seizes" the entire work force for the duration of each survey. We argue below that the stationing of agents at the doors to prevent illegal aliens from es-

caping does not result in a seizure of the entire work force, and even if it does in a technical sense amount to such a seizure, any intrusion on the freedom of law-abiding workers is so minimal that it is reasonable under the Fourth Amendment when considered in light of the practical necessity for the procedure.

The second type of seizure said to be involved in this case arises from the questioning of individual employees regarding their immigration status in the course of a factory survey. It is our position that INS agents generally may inquire about a person's immigration status without any suspicion whatever so long as the inquiry is not accompanied by a seizure within the meaning of the Fourth Amendment, and that they may detain a person briefly in the course of such an inquiry on the basis of a reasonable suspicion of alienage, without a showing of illegal alienage. Moreover, even if a reasonable suspicion of illegal alienage is required to stop a single individual for the purpose of questioning him about his immigration status, we submit that individualized suspicion is not required to stop and question in the context of a factory survey, where the agents have reason to believe that a substantial number of the workers are in this country illegally.

The court of appeals acknowledged that none of the seizures involved in this case is so intrusive as to require probable cause to arrest. See Pet. App. 11a-12a (distinguishing *Dunaway* v. *New York*, 442 U.S. 200 (1979)). Under settled principles, the lawfulness of seizures that are less intrusive than a traditional arrest is assessed by application of "the ultimate standard of reasonableness embodied in the Fourth Amendment." *Michigan* v. *Summers*, 452 U.S. 692, 699-700 (1981) (footnote omitted). In this area of

Fourth Amendment law, "'[t]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 9, quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). See also, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 6-7; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

Here, the court of appeals concluded that the manner of executing the factory surveys, particularly the stationing of INS agents at the doors, results in the seizure of the *entire* work force for the duration of the survey and that such a seizure is unconstitutional unless the agents have a reasonable suspicion of *illegal* alienage with respect to *each* employee who happens to be present on the premises. The court reached this extraordinary result on the basis of a mechanistic application of general Fourth Amendment rules fashioned in other contexts, without engaging in the necessary task of evaluating the propriety of the agents' actions under the Fourth Amendment's reasonableness standard. As we show below, the intrusion, if any, on factory workers' Fourth Amendment interests that results from the execution of surveys at their places of employment is insignificant when contrasted with the substantial government interests in apprehending aliens who have entered or remained in this country illegally and who are "competing with citizens and legal resident aliens for jobs." *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878-879. Accordingly, we submit that factory surveys

such as those involved in this case are reasonable under the Fourth Amendment.

A. The Stationing of INS Agents at Exits During a Factory Survey Does Not Result in the "Seizure" of the Entire Work Force

In our view, the court of appeals seriously erred in holding that the stationing of agents at exits during a factory survey constitutes an illegal seizure of the entire work force. The court purportedly applied the test set forth by Justice Stewart in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (footnote omitted), that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." See Pet. App. 12a-13a, 19a-20a. See also *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6, 10 (plurality opinion); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting); *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). However, it simply ignores the realities of the situation to hold that every worker in a factory is "seized" under this test as soon as INS agents commence a factory survey by taking up positions at the exits and before any questioning at all has occurred.

Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a "freedom to leave" that is restrained by the appearance of the INS. The factory surveys in this case were conducted entirely during normal working hours. See J.A. 81, 108, 133. At such times the employees presumably were obligated to their employer to be present at their work stations perform-

ing their employment duties; accordingly, quite apart from the appearance of the INS agents, the employees were not "free to leave" the factory in any real sense. Given the undisputed fact that during the surveys employees, including respondents, were free to walk through or exit the factory in the course of performing their duties (J.A. 90, 93-94, 98, 109-113, 136-137, 143), the court of appeals' opinion does not explain how the INS agents here restrained the "freedom to leave" of members of the work force in any meaningful sense.

More fundamentally, there is no basis for finding that employees who were not illegal aliens would have felt their freedom restrained by the stationing of agents at the exits. The purpose of the surveys was manifest and was announced by the INS agents, namely, to apprehend illegal aliens. See J.A. 152. Hence, as respondent Correa candidly testified (J.A. 116), a citizen or alien legally present in this country knew immediately that he or she personally had nothing to fear from the INS; such individuals could not reasonably have felt threatened or restrained by the survey. They reasonably should have understood that the INS agents at the exits were positioned to stop only illegal aliens from leaving, not to curtail the movements of others. Thus, contrary to the court of appeals' suggestion (Pet. App. 11a), a citizen or legal alien should not have felt coerced if he or she saw workers arrested who were trying to flee.

Respondents argue (Br. in Opp. 6-7, 8) that the court of appeals based its holding that the factory surveys resulted in the seizure of the entire work force not only on the stationing of agents at the exits but also on other factors, such as the element of surprise, the number of agents involved, their display

of badges, their manner of proceeding methodically through the factory, and the use of handcuffs to detain suspected illegal aliens. But these actions, like the positioning of agents at the doors, clearly are directed at apprehending illegal aliens, and thus employees such as respondents who are citizens or lawfully present aliens have no reason to conclude that their freedom of movement is restricted by the manner in which the surveys are conducted.[15] Similarly, the fact that the surveys are often accompanied by shouts of "la migra" and the flight of a number of employees does not transform them into seizures of the entire work force. These voluntary actions, undertaken by illegal aliens in the work force to avoid apprehension, are not attributable to the INS agents and constitute no intrusion on the freedom of employees who are lawfully present in the United States.[16]

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[15] Moreover, it is clear that the dispositive factor in the court of appeals' analysis was the stationing of agents at the exits. Indeed, in *Zepeda* v. *INS*, 708 F.2d 355, 363 (9th Cir. 1983), the court of appeals specifically stated that its holding in this case that an INS factory survey constitutes a seizure of the work force rested on the fact that agents are stationed at the doors during the survey.

[16] Respondents contend (Br. in Opp. 13-14) that the surveys raise fears among law-abiding workers that they may be mistaken for illegal aliens and arrested. But these fears have no objective basis grounded in the manner in which the surveys are conducted. Indeed, none of respondents was arrested or threatened with arrest. (The only original plaintiff who was subjected to an arrest—Guadalupe Rodriguez—was in fact an illegal alien. See note 11, *supra*.) At most, respondents were asked one or two questions about their immigration status and, where appropriate, were asked to produce their alien registration papers. Although respondent Delgado claimed

B. Even if the Stationing of INS Agents at Factory Exits Results in a Technical "Seizure" of the Entire Work Force, That Seizure is Reasonable Under the Fourth Amendment

Even if the court of appeals were correct in concluding that the stationing of agents at the exits is in some technical sense a seizure of the entire work force, including those employees who are not illegal aliens, the court nevertheless erred in finding that such precautionary action violates the Fourth Amendment. This Court has recognized that a limited intrusion that rises to the level of a Fourth Amendment "seizure" may in some circumstances be effected in the absence of an individualized basis for suspicion. See *United States* v. *Martinez-Fuerte, supra; United States* v. *Villamonte-Marquez, supra.*

In *Martinez-Fuerte*, the Court upheld the authority of the Border Patrol to maintain permanent checkpoints at or near intersections of important roads leading away from the border, at which all vehicles are required to come to a virtual halt as they pass by, even though the Court assumed that each car is thereby "seized" within the meaning of the Fourth Amendment. See 428 U.S. at 546 n.1, 556. Moreover, the Court held that the Constitution permits the selective referral of some vehicles to a secondary

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that he overheard one agent remark that he would have to come back and check Delgado out more carefully on a subsequent visit (J.A. 94), there is no evidence that the agent in fact did return to question Delgado and the INS received no complaints from Delgado or anyone else regarding the conduct of any of its agents during the three surveys at issue here. Moreover, even assuming that the agent's comment was improper, it provides no basis for concluding that the survey procedure implicates legitimate Fourth Amendment concerns, justifying a grant of declaratory or injunctive relief.

checkpoint for three to five minutes of questioning without an articulable basis for suspecting that the vehicle contains illegal aliens. *Id.* at 563-564.

The Court in *Martinez-Fuerte* noted that there is a substantial public interest in maintaining checkpoints in order to control the flow of illegal aliens into this country. 428 U.S. at 556-557. Routine checkpoint inquiries result in the apprehension of large numbers of illegal aliens and deter others from entering and attempting to reach interior points away from the border. At the same time, the Court pointed out that the intrusion on Fourth Amendment interests occasioned by checkpoint stops is quite limited. *Id.* at 557-560. The stops involve only a brief detention, with no search of the vehicle or its occupants. Moreover, unlike roving patrol stops of automobiles, "the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. * * * 'At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'" *Id.* at 558, quoting *United States* v. *Ortiz*, 422 U.S. 891, 894-895 (1975). Finally, although the practice of selective referral "may involve some annoyance, * * * it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature." *Martinez-Fuerte*, 428 U.S. at 560.

Here, as in *Martinez-Fuerte*, the governmental interests that make it reasonable to station agents at factory exits during a survey outweigh the minimal intrusion occasioned thereby, and hence any theoretical seizure of the entire work force does not violate

the Fourth Amendment. This Court has recognized that most aliens who enter or remain illegally in the United States are drawn by the fact that economic opportunities are significantly greater here than in their native countries. See *Martinez-Fuerte*, 428 U.S. at 551. Thus, as we have already noted (see pages 3-4, *supra*), factory surveys are the most effective means of detecting and apprehending illegal aliens who have avoided detection by the Border Patrol. The use of such surveys allows the INS to focus its limited resources on businesses that are known to employ significant numbers of illegal aliens. In addition, by conducting surveys that result in apprehension of illegal alien workers, the government helps to increase the number of employment opportunities that are available to persons who are lawfully in the United States. By the same token, an effective program of enforcing the immigration laws in places of employment will have the salutary goal of deterring the arrival of illegal aliens. Persons from other countries will have less incentive to come here illegally in search of employment if they know that the immigration laws are effectively enforced in the work place. Finally, the manner in which the surveys are carried out, including the stationing of agents at the doors, is entirely reasonable if the surveys are to be effective in accomplishing their purpose.

In contrast to the substantial public interests advanced by factory surveys, the intrusion on the Fourth Amendment interests of the workers—to the extent that such an intrusion rises to the level of a seizure at all—is minimal indeed. Here, as in *Martinez-Fuerte*, the person "can see visible signs of the officers' authority" because the agents display their badges during the surveys. Moreover, any brief con-

tact that a law-abiding worker may have with an agent "should not be frightening or offensive because of [its] public and relatively routine nature."

The court of appeals, however, sought to distinguish *Martinez-Fuerte* on the ground that the checkpoint stop at issue in that case involved a lesser intrusion than a factory survey. Pet. App. 32a-35a. The court's purported distinction does not withstand analysis. To be sure, employees at a factory do not know in advance when their workplace is going to be surveyed, while a traveler familiar with the highway in *Martinez-Fuerte* would not have been surprised to come upon the checkpoint (although he could not have anticipated being selected for secondary referral). In the most significant respects, however, the alleged seizure involved in the factory survey is substantially *less* intrusive than the checkpoint stop in *Martinez-Fuerte*. First, the alleged seizure in connection with the factory survey is only theoretical; the workers are free to go about their business and, as a practical matter, they engage in the same activity that they would if the INS did not appear. By contrast, the traveler stopped at a checkpoint is truly "stopped" and is diverted completely for up to five minutes from what he would otherwise have been doing.[17] Furthermore, it is difficult to see

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[17] The court of appeals expressed the view that the detention in *Martinez-Fuerte* was of much shorter duration than that involved here. See Pet. App. 34a. But the court's conclusion that each individual member of the work force is seized for one and one-half hours during a factory survey is manifestly erroneous. While the entire survey, during which the employees are free to continue to go about their work, may last that long, it is clear that, to the extent there is any detention at all, the maximum that any individual who wishes

how the factory survey could engender any anxiety in a reasonable individual who is lawfully in this country; because he is immediately aware that the purpose of the survey is to apprehend illegal aliens, he knows that he is not subject to arrest and at worst will be asked only to answer a question about his citizenship status or show proper documentation to the agents. At a checkpoint, however, an individual singled out for selective referral will be considerably more anxious because he often will not be aware of the reason he has been singled out, and hence the seizure is significantly more intrusive for him.

The court of appeals' decision severely undermines the utility of INS factory surveys by effectively barring under any circumstances the stationing of agents at exits to prevent illegal aliens from fleeing during a factory survey. Under the reasoning of the court of appeals, even if INS agents have probable cause to believe that 99 out of 100 persons present in a factory are illegal aliens, agents cannot be stationed at the exits because that would constitute an unlawful seizure of the one person inside who is not an illegal alien. Moreover, the result reached by the court of appeals does not turn on the absence of a search warrant. Indeed, two of the three factory surveys underlying the present litigation were supported by warrants based upon probable cause to believe that a number of the employees at the factory to be inspected were illegal aliens.

Of course, we do not dispute that the manner in which a warrant is executed is subject to review as to reasonableness without regard to the validity of the

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to leave is detained is the very short time needed for him to answer an agent's question regarding his citizenship status, after which he clearly is free to leave.

warrant itself. See *Dalia* v. *United States*, 441 U.S. 238, 258 (1979). But under the court of appeals' reasoning, even if a magistrate were to issue a warrant authorizing INS agents to search a particular factory for certain named persons believed to be illegal aliens, it apparently would still be unlawful to station agents at the exits while searching for the employees named in the warrant because of the incidental "seizure" of the other employees not named in the warrant.[18] (By the same token, it presumably would be unlawful for law enforcement officers executing arrest warrants at particular premises to station themselves at the door in order temporarily to bar egress, so long as a single person inside the premises was not among those for whom the officers had arrest warrants.)

Clearly, the effectiveness of factory surveys will be greatly diminished, if not totally destroyed, if the INS is not permitted to station agents at the doors of a factory to prevent escape while the survey is being conducted. Indeed, the court of appeals itself recognized that its decision barring the stationing of agents at the exits would reduce substantially the number of illegal aliens apprehended and hence

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[18] We proffer this hypothetical simply to illustrate the extreme implications of the court of appeals' logic. As a practical matter, in the relatively small number of cases in which a warrant is used as a basis for entry into a factory to conduct a survey, the warrant does not specifically name suspected illegal aliens employed at the factory. The record demonstrates the difficulties that would be entailed in seeking to obtain that level of specificity in factory survey warrants. The composition of the work force in factories at which surveys are most often performed is not stable and changes constantly. In addition, in the experience of the INS, employers' records often list false names for the employees and inaccurate data concerning the workers' citizenship status. See J.A. 44-45.

hinder INS enforcement efforts. Pet. App. 16a, 42a. Moreover, to the extent the INS is able to continue with such surveys at all in light of the court's opinion, the disorder and danger involved in conducting the surveys will be greatly increased because illegal aliens will be encouraged to flee by the absence of anyone visibly guarding the exits.[19]

The error of the court of appeals' analysis is manifested by the unacceptable implications of its holding in analogous contexts. According to the decision below, if one or more criminal fugitives were to flee into a building (such as a department store) that also contained innocent persons, the police would not be permitted to guard the exits of the building and briefly check everyone who exited because that would constitute an illegal seizure of the innocent occupants. Indeed, under the court of appeals' decision, it is difficult to discern the constitutional basis for a roadblock to catch a fleeing criminal or to check for safety violations, since innocent persons would surely be stopped. But this Court has indicated that such practices are reasonable under the Fourth Amendment. See *United States* v. *Villamonte-Marquez*, *supra*, slip op. 9-10; *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663; *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 560 n.14.

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[19] The decision of the court of appeals presumably would not bar stationing agents near the exits but outside the factory and out of the view of its workers. See Pet. App. 18a-19a. Because this procedure would not discourage attempts to flee and would not be nearly as effective in apprehending those who seek to flee, it is likely to cause even more disruption to persons like respondents, as well as to increase the dangers to agents and fleeing aliens.

C. The Fourth Amendment Does Not Require INS Agents to Have a Reasonable Suspicion That Each Employee Questioned as to Citizenship Status During a Factory Survey is an Illegal Alien

Thus far we have addressed the court of appeals' conclusion that the factory surveys result in the seizure of the work force in the aggregrate. Having shown that the general procedures employed by INS agents during a survey, particularly the stationing of agents at the exits, do not entail a seizure of the entire work force for the duration of the survey, and that such procedures are reasonable in any event, we now turn to consider whether the particular encounters between INS agents and individual employees in the course of a factory survey, in which the employees are questioned concerning their citizenship status, violate the employees' Fourth Amendment rights.

During the course of a factory survey, INS agents approach employees who they have reason to suspect are aliens and question those employees concerning their immigration status. The first question is intended to reveal whether the individual is a citizen. The agent may ask the employee whether he is a citizen of the United States or he may inquire as to the employee's place of birth. If the employee answers that he was born in the United States or is a United States citizen, and if there is no reason to disbelieve that response, no further questions are asked.[20] If the employee indicates that he is not a citizen, the agent generally requests the employee to produce his alien registration document. Once the proper papers are

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[20] If the agent has reason to believe that the employee is lying about his citizenship status, he may inquire further or ask for some identification. But normally, the agent moves on when an employee claims to be a citizen.

produced, the documented alien is free to continue with his work. See J.A. 44, 87-88, 94-96, 105, 115, 120, 123, 138-139, 152.

The encounters between the INS agents and the respondents that are described in the record are illustrative of the nature and extent of the contacts between agents and individual workers in the course of a typical survey. During the September 1977 survey at Davis Pleating, INS agents approached respondents Delgado and Correa in separate incidents and asked where each was born. When Delgado responded that he was born in Puerto Rico and Correa responded that she was born in California, the agents moved on to question other workers. J.A. 94-95, 115.[21] Similarly, after respondents Miramontes and Labonte (both of whom are resident aliens) produced their immigration documents at the request of INS agents, they were not questioned further and were permitted to go about their business. J.A. 120-121, 138-140.

In their complaints, respondents contended that their Fourth Amendment rights were violated by these encounters, and that INS agents may not stop and question individual workers during a survey unless they have a reasonable suspicion that each employee so questioned is an alien illegally in this country. J.A. 16-17, 27-28. The district court rejected this contention, concluding that employees are not seized at all during a typical survey and that the Fourth Amendment does not prohibit law enforcement officers from questioning anyone so long as they have not effected a seizure of that person. The court

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[21] During the January 1977 survey, INS agents did not approach or question Correa at all, and Delgado's only contact with the agents occurred when he was asked whether he had a key for the back door. J.A. 90, 106.

also noted that even if employees are technically seized for questioning during a survey, the employees' Fourth Amendment rights are not violated in view of the minimal nature of the intrusion. Pet. App. 47a.

The court of appeals viewed this case as presenting two related issues concerning the constitutional standard applicable to the questioning by INS agents of employees concerning their citizenship status during factory surveys: (1) whether such questioning "is constitutionally valid when based upon a suspicion of alienage alone," and (2) "whether less than individualized suspicion is sufficient for questioning workers present in a factory known to employ illegal aliens." Pet. App. 22a. The court went on to hold that the Fourth Amendment requires a reasonable suspicion of illegal alienage with respect to each employee detained for questioning in the course of a factory survey. As we now demonstrate, the court's holding is fundamentally in error, both with respect to the requirement of a suspicion of *illegal* alienage and also with respect to the requirement that that suspicion be *individualized*.

1. *The Fourth Amendment Permits an INS Agent to Stop and Question a Person Reasonably Suspected of Being an Alien as to His "Right to Be or to Remain in the United States"*

We note at the outset of this discussion that the kind of questioning conducted in the normal course of a factory survey—including specifically all the questioning to which respondents asserted they were subjected (J.A. 94-95, 115, 120-121, 138-140)—does not constitute a seizure of the workers' person regulated by the Fourth Amendment. The initial brief inquiry regarding citizenship is not accompanied by any physical force or show of authority from which a

citizen would reasonably conclude that he or she was in danger of being forcibly detained. Rather, all that occurs is an approach and the polite posing of a simple question or two, action that does not constitute a seizure. See *Florida* v. *Royer*, *supra*, slip op. 5-6, 10 (plurality opinion); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 554 (opinion of Stewart, J.); *Terry* v. *Ohio*, *supra*, 392 U.S. at 19 n.16. Since nothing more than a brief consensual encounter characterizes the typical interaction between the agents and citizen workers or lawfully resident aliens, it cannot be said that any substantial Fourth Amendment issue even arises with respect to most of what transpires at the factory premises during the survey.

It is true, however, that the INS believes its agents possess the right to detain for further investigation a person who refuses voluntary cooperation if they suspect that person to be an alien—legal or illegal. Rejecting this position, the court of appeals held that an INS agent may not detain an employee for questioning during a factory survey unless he has a reasonable suspicion that the employee is an illegal alien. We submit that a reasonable suspicion of alienage is sufficient in this context to satisfy the reasonableness requirement of the Fourth Amendment.

In *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 881, this Court held that a Border Patrol officer may not make a roving patrol stop of a vehicle in areas near the border unless the officer has a reasonable suspicion that the vehicle contains aliens who are illegally in the country. The Court, however, left open the question presented here, concerning the proper standard for a brief investigatory stop of an individual outside the automobile context. See *id.* at 884 n.9. In so doing, the Court assumed that "the

broad congressional power over immigration * * * authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country," but it expressed the view that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than *a reasonable suspicion that they may be aliens.*" *Id.* at 884 (emphasis added). The Court's statement in *Brignoni-Ponce* is fully consistent with our position in this case.

It is well settled that Congress has broad powers over immigration matters. See, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972). In the exercise of these powers, Congress has provided by statute for the registration of all aliens in the United States. 8 U.S.C. 1302, 1304. Under this registration program, each alien must submit to fingerprinting and must provide information concerning the date and place of his entry into the United States, the activities in which he intends to engage, the length of time he expects to remain in the United States, and his criminal record. 8 U.S.C. 1304(a). The statute further provides that every adult alien who has been registered shall be issued a certificate of alien registration or an alien registration receipt card, which he must "carry with him and have in his personal possession" at all times. 8 U.S.C. 1304(d) and (e).[22] The manifest purpose of this provision is to enable the INS to ascertain whether an individual is a lawfully registered alien. See *United States* v. *Campos-Serrano*, 404 U.S. 293, 299-300 (1971).

Moreover, in 8 U.S.C. 1357(a)(1), Congress has expressly empowered immigration officers "to inter-

[22] Violations of this provision are punishable by a fine of $100 and 30 days' imprisonment.

rogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *." Both this Court and the lower courts generally have understood Section 1357(a)(1) to cover questioning that is accompanied by a seizure within the meaning of the Fourth Amendment. See, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*; *Lee* v. *INS*, 590 F.2d 497, 500 (3d Cir. 1979); *United States* v. *Martinez*, 507 F.2d 58, 61 (10th Cir. 1974). By its terms, however, as the court of appeals itself acknowledged (Pet. App. 31a), Section 1357(a)(1) plainly does not require any suspicion of illegality as a prerequisite to such questioning. The statute thus manifests Congress' considered judgment that detentive questioning in the immigration context may be undertaken on the basis of a reasonable suspicion of alienage.[23]

Under this statutory scheme, therefore, Congress has conditioned each alien's privilege of residing or working in the United States on fulfillment of the obligation to carry at all times a registration card evidencing his right to be here. Aliens who choose to work or reside here accept that obligation and, by the same token, the obligation to produce proper documentation when requested to do so by INS officials pursuant to 8 U.S.C. 1357(a)(1). If they were free

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[23] Although the court of appeals was of the view that the Constitution does not permit any seizure of a person on the basis of alienage alone without a suspicion of illegality, the court did not expressly find Section 1357(a)(1) unconstitutional. Rather, it held that the Fourth Amendment limited the applicability of Section 1357(a)(1) by requiring that INS agents who detain individuals for questioning about their immigration status pursuant to the statute must have a reasonable suspicion that each individual so detained is an alien illegally in this country. Pet. App. 30a-32a.

to refuse such a request, the requirement to carry identification would be rendered virtually meaningless.

Because an alien's status is pervasively regulated by the government, the detention of a suspected alien for purposes of inquiring into his immigration status is analogous to searches of pervasively regulated businesses, which may be undertaken without a warrant where necessary to carry out the legitimate regulatory goals of the statute. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594, 599-600 (1981); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972). This Court has explained that "when an entrepeneur embarks upon such a pervasively regulated business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Similarly, an alien who has chosen to reside and work in the United States "accept[s] the burdens as well as the benefits of [his status]" and "in effect consents to the restrictions placed upon him." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973).[24] In short, it is reasonable under the Fourth Amendment for an INS agent briefly to detain an individual reasonably suspected of being an alien so long as the detention is limited to inquiring as to the alien's right to be present in the United States.[25]

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[24] In *Almeida-Sanchez* this Court limited on constitutional grounds the authority to *search* granted by Section 1357. That decision, however, in no way affected the INS's authority to interrogate conferred by Section 1357(a)(1).

[25] As previously noted (see note 7, *supra*), the INS has a policy of instructing its agents not to detain individuals for questioning except on a reasonable suspicion of illegal alienage. This policy reflects a recognition of the INS's manpower limitations and an attempt to formulate a

In requiring a suspicion of illegal alienage, the court of appeals reasoned (Pet. App. 31a) that "[a]n alien * * * may be in this country in total compliance with the immigration laws" and that "innocent citizens and aliens legally employed at surveyed factories enjoy the same right to be free of the indignity of arbitrary government intrusions which the Fourth Amendment guarantees all individuals." But it is not "arbitrary" to stop and question a person reasonably suspected of being an alien as to whether he is carrying with him the proper alien registration documents required by law. In the context of factory surveys, so long as there are reasonable grounds to believe that a significant number of employees are illegal aliens, INS agents presumably could avoid any charge of arbitrariness by stopping and interrogating *all* employees in a given factory concerning their right to be in this country. See pages 40-43, *infra*. Such an approach would appear to satisfy the Fourth Amendment's standard of reasonableness by avoiding the possibility that individuals might be seized for questioning solely as the result of an unconstrained exercise of discretion by the officer in the field. Cf. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663; *United States* v. *Villamonte-Marquez*, *supra*, slip op. 9-10. In our view, it is equally reasonable and nonarbitrary

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uniform nationwide policy that comports with the Seventh Circuit's decision in *Illinois Migrant Council* v. *Pilliod*, 548 F.2d 715 (1977) (en banc). See also *Lee* v. *INS*, *supra*; *Au Yi Lau* v. *INS*, 445 F.2d 217, 222-223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). Contrary to the court of appeals' assertion (Pet. App. 20a n.12), the policy does not constitute a "concession" that brief questioning of an alien amounting to a seizure within the meaning of the Fourth Amendment is prohibited in the absence of a suspicion of illegality. Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979).

for agents to stop and question employees selectively, so long as the stop is based on objective, articulable facts giving rise to a reasonable suspicion of alienage. Thus, at least in the context of a minimally intrusive procedure such a factory survey, the Fourth Amendment permits INS agents to detain an individual for questioning on the basis of alienage, even in the absence of a suspicion of illegal alienage.[26]

2. ***The Fourth Amendment Does Not Require Individualized Suspicion for the Detention of Employees for Questioning During a Factory Survey if the Detention is Supported by a Reasonable Suspicion That a Substantial Number of the Employees are Illegal Aliens***

Even if the court of appeals were correct in concluding that detentions of employees for questioning during factory surveys must be based on a reasonable suspicion of illegal alienage, its holding that the required suspicion of illegality must be individualized is erroneous. Under the decision below, INS agents' reasonable suspicion (or even probable cause to believe) that numerous factory employees are illegal aliens does not justify the seizure of any particular employee. This holding creates a new Fourth Amend-

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[26] In our view, the context of the detention is an important factor in determining its reasonableness. For instance, requesting to see an alien's papers while he is standing at his work station is less intrusive than stopping an alien in his car while he is traveling along a highway. For this reason, the Court's holding in *Brignoni-Ponce*, that Border Patrol officers may stop a vehicle only on the basis of a reasonable suspicion that the vehicle contains illegal aliens, is not controlling in the very different situation presented by this case. Cf. *United States* v. *Villamonte-Marquez*, *supra*, slip op. 9-10, where the Court refused to apply the standards governing roving patrol stops of automobiles to stops of vessels on inland waters providing ready access to the open sea.

ment requirement that will make it quite difficult for the INS to act on reliable information concerning concentrations of illegal aliens. As this Court stated in *Martinez-Fuerte*, 428 U.S. at 561, however, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion."

Obviously, when an officer's suspicions focus on a single individual, detention of that individual must be based on reason to suspect that he may be engaged in illegal activity. But there is no reason why, in other contexts, the basis for suspicion must be "individualized." Thus, for example, if an officer knows that seven out of ten persons are illegal aliens, the knowledge that three of the persons will turn out to be innocent does not alter the fact that, in the absence of any additional information dispelling the suspicion with respect to a particular individual, the officer has a reasonable suspicion of illegal alienage (indeed, probable cause) with respect to each person sufficient to justify an initial detention for purposes of inquiry.[27]

Often a search or seizure will momentarily invade the privacy of persons who are not individually suspected of being in violation of the law. For instance, in the administrative search context, a warrant for an "area inspection" need not be based on specific evidence of an existing violation, but may rest instead on a showing that " 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Marshall* v. *Barlow's, Inc.*, *supra*,

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[27] Of course, the reasonable suspicion standard recognizes that in most cases further inquiry will dispel the suspicion. Thus, as long as it is supported by reasonable suspicion at the time, a detention is consistent with the Fourth Amend-

436 U.S. at 320, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967). Similarly, Customs officers may board a vessel to examine the vessel's manifest and papers without suspecting any unlawful conduct. *United States* v. *Villamonte-Marquez*, *supra*. In the immigration context, the right to stop a car at a fixed checkpoint does not rest on any individualized basis for suspicion of a particular car. See *Martinez-Fuerte*, 428 U.S. at 560-563. By the same token, Border Patrol officers may conduct a roving patrol stop where they have reason to suspect that at least one of the occupants of a car is an illegal alien or is engaged in criminal activity. See *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 884. Although the stop necessarily will effect an intrusion on all occupants of the car, the agents need not possess reasonable suspicion with respect to every occupant.

The Third Circuit has correctly rejected the notion that a particularized suspicion is necessary for a detention of employees during a factory survey. *Babula* v. *INS*, 665 F.2d 293 (1981). In *Babula*, INS agents had received a tip that a factory was employing illegal aliens from Poland. After corroborating the tip, the agents decided to conduct a factory survey (which is described in the court's opinion as an "area control operation"). The agents briefly questioned every individual in the factory, even though "the agents had observed nothing specifically about each person questioned, but rather based their suspicion on the milieu in which the workers were found." *Id.* at 296. The court of appeals held that "the tip from a reliable source about the employment of illegal Polish aliens, combined with indicia

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ment even though the suspicion later turns out to be unconfirmed.

that [the factory] did employ Polish aliens, [was] sufficient to justify the minimally intrusive questiontioning that the agents conducted." *Ibid.*[28]

A requirement of individualized suspicion of illegal alienage would make enforcement of the immigration laws in the work place virtually impossible. As in the instant case, the INS routinely receives information that a particular factory employs large numbers of illegal aliens, but rarely does it receive names and descriptions of the individual aliens. Nor is it likely that the INS will have reasonable suspicion that *every* employee is an illegal alien. Hence, if the Fourth Amendment requires particularized suspicion, surveys of factories for illegal aliens will never be conducted.

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[28] In so holding, the *Babula* court relied in part on the fact that every employee in the factory was questioned, and therefore the INS agents did not exercise "unconstrained discretion" in selecting whom to interview. 665 F.2d at 296-297. Although this Court has suggested that a particular law enforcement practice is more likely to comport with the Fourth Amendment's reasonableness requirement if it involves a minimal amount of discretion on the part of the officer in the field, it is not essential that every permissible law enforcement practice be devoid of all discretion. For example, at a traffic checkpoint, INS agents may selectively refer only some of the cars to a secondary inspection station for questioning, without a reasonable suspicion as to the individual car. *Martinez-Fuerte*, 428 U.S. at 563-564. Indeed, "[l]ess than 1% of the motorists passing the checkpoint are stopped for questioning." *Id.* at 563 n.16. In contrast, far less discretion is exercised during a factory survey, where INS agents question with regard to citizenship status on the basis of a reasonable suspicion of alienage. See note 7, *supra*. The showing of reasonable and particularized suspicion underlying the selection of particular individuals for detention and questioning constitutes an equivalent and effective curb on arbitrary official behavior.

In sum, the court of appeals has unjustifiably struck down reasonable and minimally intrusive procedures that are exceptionally valuable to the conduct of the INS's mission. Its decision should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

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